89-348

No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JACK L. HARGROVE BUILDERS, INC.,
and
JACK L. HARGROVE

Petitioners,

vs.

JOHN F. ROSCH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

Although Petitioners claim jurisdiction under 28 U.S.C. #1257(a), they fail to frame a substantial federal question which was raised or decided by the Illinois Supreme Court. To the contrary, Petitioner complains about state substantive law which, though properly applied, contends resulted in a denial of *"due process."*

The basis for their arguments are that (1) the exclusion of irrelevant evidence (ie., post occurrence events) somehow deprived them of due process and (2) the exclusion of evidence on the question of damages somehow also deprived the petitioner of due process of law in violation of the Fourteenth Amendment.

The petitioner, Hargrove, was indisputably proven to be the perpetrator of the tort of fraudulent misrepresentation in conjunction with the sale of his half-interest in an on-going partnership to respondent, Rosch, has at the twelfth hour, attempted to fabricate federal constitutional issues.

As part of the sale and transfer of Hargrove's interest in the partnership, the trial court found that Hargrove had misrepresented (understated) more than $1 million dollars in partnership debts[1] but this amount was reduced to a judgment of $148,977.58 against Hargrove.

Both the Appellate Court of Illinois, 2nd District, (Order Pursuant to Supreme Court Rule 23, Appellate Court of Illinois, Second Judicial District, March 7, 1988 [opinion set

[1] After a 17 day bench trial, the trial judge found that Hargrove had intentionally misrepresented the liabilities of the joint venture (of which he was the managing partner) in an amount over $1.1 million dollars, but the court disallowed a substantial portion of the misrepresented debts because the plaintiff (Rosch) did not show *"justifiable reliance."* Under Illinois law, one of the requisite elements which plaintiff must prove to recover damages for the intentional tort of fraudulent misrepresentation is *justifiable reliance.*

forth in its entirety in Petitioners' Appendix C]) and the Supreme Court of Illinois, 128 Ill.2d 179, 538 N.E.2d 530 (1989) affirmed the judgment as to the plaintiff, Rosch, *in toto*.

Only after the Supreme Court of Illinois rendered its opinion, *supra*, did the "*constitutional issues*" appear for the first time (ie., in Petitioners' Petition for Rehearing). Words like "*due process*" or "*deprivation of [his] constitutional rights*" appeared only after the Illinois Supreme Court had ruled against Hargrove on all matters.

To further "bootstrap" Petitioners' federal questions, they have attempted to advance arguments predicated upon incorrect (or misstated) factual matters or upon evidence that was specifically excluded.

Accordingly, the Petition should be denied because the appeal does not present a substantial Federal question, or in the alternative, for failure of Respondent to properly (and timely) raise a Federal question in the State Court so as to vest this Court with jurisdiction.

RESPONDENT'S STATEMENT OF THE CASE.

This entire case was originally predicated upon a simple, two-page written agreement which was executed on or about March 1, 1981.[2] In that agreement, Hargrove sold his one-half interest in a partnership to Rosch for $200,000 and Rosch's assumption of the debts of the partnership as represented to him by Hargrove. As part of the "inducement" for Rosch to

[2] This relatively innocuous appearing document has, so far, given rise to 10,000 pages of pleadings, 8,000 pages of transcripts, has also been the basis for four (4) separate law suits, two (2) appeals to the Illinois Appellate Court, one (1) Petition for a Writ of Mandamus and one (1) appeal to the Illinois Supreme Court (and has produced litigation that has been in the Court system for approximately 7 years). These factors are germane when Hargrove's argument that he was deprived of due process and access to the Court's is considered. *Infra*.

purchase Hargrove's interest, the Petitioner provided Rosch with a written schedule of debts and liabilities of the partnership. These lists were prepared by Hargrove from his own records. At the closing, Hargrove reaffirmed the correctness and accuracy of the lists. C-7836; C-8933-34. During the time that Hargrove was an owner and partner, he had *"virtually autonomous control"* of all of the books and records of the partnership.

As was later proven at the trial, Hargrove understated the debts by more than $1 million — however the Court did not award this entire amount as damages (because of the doctrine of *"justifiable reliance"*).

The understated debts consisted of amounts due various sub-contractors and tradesmen. All of the Illinois Courts (ie., Circuit Court, Appellate Court and Supreme Court) applied the substantive rule of law commonly known as the *benefit-of-the-bargain* rule in computing damages to which this respondent was entitled to recover. Under the *benefit-of-the-bargain* rule (which, according to Illinois law) governs the damage computation in fraudulent misrepresentation cases and "damages are determined by assessing the difference between the actual value of the property sold and the value the property would have had if the representations had been true." *Gerill vs. Hargrove*, 128 Ill. 2d 179, 538 N.E.2d 530 (1989); *Kinsey vs. Scott*, 124 Ill. App. 3d 329, 463 N.E. 2d 1259.

The petitioners herein, for the first time, claim that because they were not allowed to present evidence of their "theory of defense" (which consisted of events occurring subsequent to the March 1, 1981 agreement) they were denied due process.

HARGROVE'S THEORY OF DEFENSE IS PREDICATED UPON IRRELEVANT, IMMATERIAL AND INCORRECT DATA.

From the inception of this litigation, one of the tact's employed by Petitioners' counsel was to "attack" everybody who in any way disagreed with their "*theory of the case.*" A few examples of such tactics can be found in the trial court where one of the trial judges accused petitioners' counsel of unprofessional conduct:[3] The following is an exact quote from the Honorable John Teschner, Judge of the Circuit Court:

> "The reason I am tempted to is what I consider as some of the most unprofessional conduct I have ever seen displayed.
>
> * * * Making bare allegations against a Judge which are not borne out in fact, in an attempt to effectuate a change of venue . . . this is a continual baiting and trying of a judge.
>
> I don't mind being tried, but I do mind unprofessional conduct. * * *"

This "conduct" was also noted by the Honorable Judge Helen Kinney in her "Letter of Opinion:"

> "The conduct of this litigation in behalf of Hargrove has sometimes tended to make it unnecessarily complex. The trial was vexatiously lengthened by Hargrove's repeated efforts, after ruling had been obtained and a record sufficient for appeal made, to introduce testimony and exhibits deemed irrelevant." C-5544. (See: Petitioners' Appendix D13.)

The Illinois Appellate Court also commented upon the fact that the "disputes between these parties have been rendered unduly complex by the parties excessive litigation." (See: Petitioners' Appendix C12.)

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[3] Transcript of Proceedings, October 1, 1984 Appellate Court Record, Supplemental Appendix in Support of Brief, Appendix I.

The petitioners are again attempting to argue that they should have been permitted to inquire into events that occurred after March 1, 1981 and that all of the Courts that have been exposed to this case have "erred" by ruling against them. This argument is totally inconsistent with the position adopted by the petitioners' counsel in the trial court, to-wit:

> At C-7805: Mr. King objected to the introduction of evidence because it was "beyond the relevant time frame."
>
> At C-7841: Mr. King objected to the introduction of oral testimony as to what occurred on March 2nd or 3rd (1981) on the grounds that it was irrelevant. "If we are talking about a breakoff date of March 1, (1981) anything that happened after is irrelevant, then none of this can be relevant."

By way of digression, it should be called to this Court's attention that shortly after the trial commenced, the respondent presented a motion in liminue (which was to be used in the event of a jury trial) and this motion was argued on October 6th (C-8263-8276) and an order was entered thereon C-5132. It was summarized best by Mr. Braun (attorney for Gerill Corporation):

> "[The appellants failed to show to the trial court a] rational, reasonable, coherent argument why going into the issue(s) of Mr. Rosch's involvement with the FSLIC . . . or the contractor's statements has anything to do with this case . . . other than to 'sling mud'." C-8268

At the time of the trial, respondent's relationship with the Federal Government was well known to Hargrove's counsel. They had "catalogued" every known event in which the respondent was involved.

From the inception of this litigation, Hargrove has attempted to "side step" the issue of his commission of fraudulent misrepresentation by attacking and placing the respondent on the defensive. This is further illustrated by Hargrove making reference to portions of the indictment of Rosch (*United States of America v. John Franklin Rosch, et. al.*, No. 89 CR 592 (N.D. Ill. filed July 13, 1989). Since Hargrove

was kind enough to enclose a copy of portions of the indictment with his petition (Appendix E), it must be reviewed and commented upon hereon so that this Court is fully aware of the real motive(s) for its inclusion. A review of the indictment clearly reveals that Counts I through XXVIII have nothing whatsoever to do with any matter before this Court (other than to note that much of the matter has already been litigated in the civil courts, *supra*).

Count XXIX of the indictment charges, in part, as follows:

> "#5. . . . [Hargrove], who held a 50% interest in . . . real estate development projects . . . sold all his interest to . . . ROSCH, who thereby became an equal partner in the projects.
>
> #6. . . . on **May 12, 1981** (emphasis added), the Board of Directors approved a proposed loan in the amount of $840,000 for several portions of the Woodridge project in which defendant ROSCH had a 50% financial interest. Defendant . . . ROSCH concealed his interest from the Board, and the proposed loan was presented . . . in the name of the individual [Hargrove].

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[4] Rosch is not stranger to litigation with the Government and is well documented in the public record. See *FSLIC vs. Rosch*, 84 C 7682 (N.D. Ill., 1984 <Incorrectly noted as a 1983 case in Hargrove's Petition>) involving Rosch's **1984** (emphasis added) purchase of common stock of Glen Ellyn Savings; *FSLIC vs. Glen Ellyn Savings*, 84 C 7685 (N.D. Ill., 1984) involving violations of a consent cease and desist order (the violations occurring in **1983** [emphasis added]); *Glen Ellyn Savings vs. FSLIC*, 85 C 6707 (N.D. Ill, **1985**) involving the use of FSLIC appraisals made in 1985 (emphasis added) which the were considered to be "low ball" appraisals by the plaintiff; *Vann vs. Glen Ellyn Savings, et. al.*, (Middle District of Florida, 86-171-CIV-T-13-C), now on appeal to U.S. Court of Appeals, 11th Circuit) involves various transactions occurring in **1984** and **1985** (emphasis again added). Most importantly, none of the above litigation has anything to do with the issue of whether Hargrove had committed the tort of fraudulent misrepresentation.

> #7. . . . in **March, 1982** (emphasis added), over one hundred land contracts were sold to prospective purchasers, . . . defendant caused Glen Ellyn Savings to purchase the land contracts. Defendant . . . ROSCH concealed from the Board . . . that he held a 50% interest in those contract.

Hargrove, in his petition states that Count 29 of the indictment relates directly to material evidence excluded in the trial of this cause and further states that Rosch's testimony, as a result of the indictment, was false and was designed to conceal some diabolical plot from the Government.

First of all, Rosch denies any wrongdoing whatsoever and respectfully submits that what occurred subsequent to the March 1, 1981 purchase of Hargrove's interest is completely irrelevant to any issue in this law suit. Rosch further respectfully submits that Hargrove is using the matters *alleged*[5] in the indictment to again engage in "character assassination."

The grave-man of the indictment is that ROSCH concealed something from the Board of Directors on **May 12, 1981** (emphasis added) — or 72 days after he had acquired Hargrove's interest.

To dispel the idea of concealment, attached hereto as Appendix "A" you will find excerpts from the *Supervisory Report of Examination of Glen Ellyn Savings and Loan Association as of April 23, 1983.* This is a report prepared by examiners from the Federal Home Loan Bank Board and the Office of the Savings and Loan Commissioner of the State of Illinois. It is done in conjunction with the management of the Savings and Loan (ie., Rosch and the Board of Directors) and a copy of the report was sent to each member of the Board. Set forth below are "quotations" from that report which

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[5] As will demonstrated later herein, the allegations made by the Government and adopted by Hargrove are just that — they are neither evidence (in this case) nor do they purport to prove anything other than the fact that the Government also employs lawyers.

should clearly dispel any belief in the correctness of the matters alleged in the indictment dealing with the subject, to-wit:

> "Mr. Rosch has previously disclosed to the directors and supervisors that he is an attorney for Mr. Gerald A. Heinz. He has also disclosed that he has had various personal business transaction with Mr. Heinz that sometimes involve projects being financed by the association. Mr. Rosch has repeatedly stated that his relationship with Mr. Heinz has had no adverse effect on the association.
>
> * * *
>
> a) **Old Business:**
>
> Mr. Rosch and Mr. Heinz continue to be listed together on signature cards for the following partnerships:
>
> H-R-G Partnership
> Deerpath Farm
> 535 Pennsylvania Partnership
> Piers II Development Company
> Oak Hill Developers
> Glenco Development Company
> R.H.H., Inc.
>
> * * *
>
> Mr. Rosch states that he is a partner in H-R-G to control Mr. Heinz's finances. The projects involve those he had purchased interests in from Jack Hargrove in 1980 (sic) and sold to Mr. Heinz in 1981 (sic). [N.B. Should be 1981 and 1982 respectively.]
>
> He is also a creditor of H-R-G in the approximate amount of $400,000. As shown in the May 26, 1982 Examination Report under "Waterbury", sale proceeds of $500,000 were used to open jumbo savings accounts at the association in the name of John Rosch, trustee for H-R-G.
>
> These accounts were later closed, but Mr. Rosch said that all but $100,000 went to pay various creditors of H-R-G or Mr. Heinz. Mr Rosch said the $100,000 was

used to pay his own income tax liability which arose from the previously mentioned sale to Mr. Heinz.

* * *

Regarding old business, Mr. Rosch said that he will stay involved with Mr. Heinz to ensure that the association's interests, as well as his own, are protected.

* * *

b) **Oak Hills, Woodridge, Illinois**

The association granted a $150,000 loan secure by ten acres of unimproved land zoned for 18 four-unit buildings and four six-unit buildings in 1977. In 1981, six lots were released then the association granted six $140,000 construction loans to build four until buildings. The borrower was Beverly Bank Trust No. 8-7010. The beneficiary of the trust was Jack Hargrove Builders, Inc., and the loan was guaranteed by Jack Hargrove. In a prior examination report Mr. Rosch informed the examiners that he purchased an interest in this property which was subsequently sold to Gerald Heinz. Mr. Rosch said that Jack Hargrove is no longer involved in the project, and it is being finished by Gerald Heinz, who is also making payments on the initial loans. Technically based on loan documents, Jack Hargrove remains the obligor since Gerald Heinz has not signed an assumption agreement with the association.

* * *

4. **Real Estate Owned Contracts.**

* * *

As readily seen, a significant concentration of these units is in one project, Waterbury. A total of 122 contracts were purchased in this complex in March, 1982. The seller was Glenco Development Company, Ltd., owned by Gerald Heinz. Mr Rosch has previously disclosed that he was once a part owner in this project. Private mortgage insurance covered 66 of the contracts. At our date, eight of the 19 "repossessed" units were

rented and there were sales prospects for several of the remaining units. . . ."

The aforesaid excerpts are set forth to dispel both the notion that the matters alleged in the indictment are factual and that the date(s) of the matters alleged in the indictment all occurred long after the transaction with Hargrove was concluded.

One of the reasons for the rather long inclusion of excerpts from one of the examination reports (prepared by the Government) is to make this Court aware that there are at least two sides to every story; that not everything the government says is correct (and is certainly not evidence in any legal sense); that nothing contained in the indictment has any relevance to the case presently before this Court; and that the tactics employed by the petitioner have not always been in keeping with the more noble goals of the legal profession.

A further example of scurrilous arguments can be found on page 13 of the petition. Hargrove states that after (emphasis added) March 1, 1981, Daniel Gilmartin signed waivers and received checks from Glen Ellyn. What has been cleverly omitted (perhaps deliberately) is that all of the loans taken out by Hargrove at Glen Ellyn were in his name and that they became the assets of the new partnership after March 1, 1981 (C-8158). Also, to facilitate the transition from the old partnership (ie., Hargrove-Heinz) to the new partnership (ie., Rosch-Heinz), Hargrove offered to execute and did sign a power of attorney which authorized Mr. Gilmartin to act for and on behalf of the Petitioner (Hargrove), (Har. Exh. 128-2, C-8305) so that Hargrove would not have to be bothered executing subsequent pay-outs.

REASONS FOR DENYING THE WRIT:

A. THERE IS A COMPLETE LACK OF A SUBSTANTIAL FEDERAL QUESTION.

Any factual basis upon which the Petitioner claims a "federal constitutional question" is non-existent, *supra*. This lack of facts can best be illustrated by noting that neither the opinion of the Illinois Appellate Court or the Illinois Supreme Court (128 Ill 2d 179, 538 N.E. 2d 530) mentions, discusses or passes upon any Federal Constitutional question.

Secondly, the Respondent has either predicated his argument upon incorrect (or deliberately inaccurate) facts or upon matters specifically excluded from evidence. *Supra*.

The decision below was rendered in absolute conformity with the power vested in the Illinois Supreme Court in the instant case. There is no legal or factual basis upon which the Petitioner can predicate a "federal constitutional question" (ie., a violation of due process or a violation of a constitutional right of access to the courts).

B. PETITIONER'S ALLEGED FEDERAL CLAIM WAS NOT PROPERLY PRESENTED TO THE STATE COURT.

Prior to the final judgment of the Supreme court of Illinois in this case, Petitioner did not raise any Federal Constitutional questions. The validity of the state law was never challenged. The Supreme Court of the United States has consistently ruled that before its jurisdiction can be invoked on appeal from a state court, it must appear that the Federal questions involved were raised in the state courts at the proper time. *Hulbert v. Chicago*, 26 S.Ct. 617, 20 U.S. 275, 50 L.Ed. 1026 (1906); *Brown v. Commonwealth of Mass.*, 12 S.Ct 757, 579, 144 U.S. 543, 580, 36 L.Ed. 546 (1892); *John v. Pauling*, 34 S.Ct. 178, 231 U.S. 583, 58 L.Ed. 381 (1914).

This Court has jurisdiction to review the final judgment of a state court "only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-497, 101 S.Ct. 1889, 68 L.Ed. 2d 392 (1981). Also, recent cases have held that this Court lacks jurisdiction unless "[a]t the minimum . . . there [is] no doubt from the record that a claim under a federal statute or the Federal constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law." *Bankers Life and Casualty Co. v. Crenshaw*, 108 S.Ct. 1645, 100 L.Ed 2d 62 (1988) quoting *Webb v. Webb, supra*, 451 U.S. at 501.

The record in this instant case substantiates respondent's contention that the petitioner has failed to raise or preserve a valid claim either expressly or by clear implication sufficient to comport with the statutory requirements.

Further, the law of Illinois requires that constitution questions be raised in the trial court and, if not, they will not be considered on appeal. *In re: Magill's Estate*, 327 Ill.App.212, 63 N.E.2d 634; *Board of Education of Arbor Park School District No. 145 Cook County v. Ballweber*, 96 Ill.2d 520, 451, N.E.2d 858. Respondent submits that Federal constitutional questions may not be presented to this Honorable Court unless the precise questions have been placed in issue before the state courts. This basic procedural requirement is completely absent in this case. Also, the raising of a federal question for the first time in a Motion for Reconsideration is not timely for purposes of establishing jurisdiction for an appeal. *Herndon v. Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935).

C. LACK OF ANY RULE 17 CONSIDERATIONS

The petition is also devoid of any of the considerations usually governing the granting of a review of certiorari as set

forth in Rule 17 of the *Rules of the Supreme Court of the United States*. No conflict of the ruling of the Illinois Supreme Court with any other court is articulated. No important question of federal law which needs resolution by this Court is argued. To the contrary, the Illinois court(s) ruled on a particular set of facts under a long standing precedent.

At best, Petitioner is arguing that this Court should now review the Illinois decision (on Constitutional grounds) because he feels that he has somehow been wronged.

D. PETITIONERS' ARGUMENTS THEMSELVES ARE NOT WELL FOUNDED IN EITHER THE FACTS OF THE CASE OR THE APPLICABLE LAW.

The petitioners' argument is that they should have been allowed to present evidence on matters which occurred subsequent (and in most cases more that a year later) to the consummation of the purchase and sale of Hargrove's interest in the partnership. Evidence that a defrauded party (ie., Rosch) subsequently resold the property at a profit or that he received his money's worth, is inadmissible on the question of damages under Illinois law because the defrauded party is entitled to the benefit-of-his-bargain. *Hilton v. Ring*, 1903, 111 Ill. App 369; *Antle v. Sexton*, 1889, 32 Ill. App. 437, aff. 137 Ill. 410, 27 N.E. 691. Exclusion of evidence by the trial court will be presumed correct by the reviewing court in the absence of a showing to the contrary. *Duggan v. Ryan*, 211 Ill 133, 21 N.E. 807 (1904) and the Court may, in its discretion, refuse any evidence not calculated to prove issues and may regulate the manner of the proceedings to promote an orderly investigation of matters in controversy. *Chgo. & A.R. Co. v. Smith*, 10 Ill. App. 359; *Hagerman v. Nat'l Food Stores, Inc.*, 5 Ill. App. 3d 439, 283 N.E. 2d 321.

Also, under Illinois law, an appellant (Hargrove) cannot, on appeal, adopt a different theory with respect to matters of evidence from that assumed in the trial court. *Handley v.*

Erb, 314 Ill. App. 207, 41 N.E. 2d 222 (1942); however, as indicated by the record, the appellants' theory as to the "appropriate time frame" varied depending upon what was most expedient at that particular time. The Illinois Appellate Court summed the matter up rather nicely (Petitioners' Appendix, at C7 and C8):

> "Hargrove challenges numerous evidentiary rulings . . . which he asserts resulted in the exclusion of relevant evidence. A trial court's determination of whether evidence is relevant is largely within its discretion, and its ruling should not be reversed absent a clear abuse of discretion (*Benson v. Bradford Mutual Fire Insurance Corp.* (1984), 121 Ill. App. 3d 500, 459 N.E. 2d 689, *appeal denied*; *Kyowski v. Burns* (1979), 70 Ill. App. 3d 1009, 1018, 388 N.E. 2d 770, . . .) We find no abuse of discretion in the exclusion of evidence based on relevancy grounds, nor do we find error in the court's exclusion of documentary evidence offered by Hargrove on the ground that they were untimely, illegible, or incomplete. * * *"

In the Appellate Court, Hargrove argued that Judge Kinney erroneously excluded "relevant and probative evidence." (See: Brief of Appellant, Appellate Court, pp 8-9). This argument was disposed of by the Appellate Court, *supra*. Subsequently, the appellant's brief (ie., Hargrove) filed with the Illinois Supreme Court did not contain any further claim of error relative to evidentiary matters. Under Illinois law, an (appellate) Court on review can only consider evidence admitted by the trial court and cannot consider evidence not admitted; *In re: Magill's Estate*, 327 Ill.App. 212, 63 N.E. 2d 634 and issues not argued in the appellants' brief are deemed waived. *Board of Education of Arbor Park School District . . . v. Ballweber*, 96 Ill. 2d 520, 451 N.E. 2d 858, 71 Ill.Dec. 704. To further illustrate the complete absence of any argument made in the Supreme Court of Illinois relating to any questions dealing with the exclusion of *irrelevant evidence* offered by Hargrove, this Court's attention is directed

to Justice Clark's opinion in the Illinois Supreme Court (Petitioners' Appendix A), and in particular at page A-10-11 (listing the five (5) claims of error in Hargrove's Appeal No. 67035). Conspicuously absent from any claim of "error" is the exclusion of evidence that the trial court deemed "irrelevant."

The petitioners' second argument is that "[t]he Illinois courts' erroneous interpretation of the benefit-of-the-bargain rule unconstitutionally denied Hargrove of property without due process."

This statement is a *non sequitur*, is illogical on its face and displays a complete lack of understanding of the benefit-of-the-bargain rule as enunciated by Illinois Supreme Court and is absolutely contrary to the evidence in this case.

The general rule prevailing in most jurisdictions is that a person acquiring property by virtue of a commercial transaction who has been defrauded may recover as compensatory damages in a tort action the difference between the value of the property at the time of the making of the contract and the value that it would have possessed if the representations had been true. *Gerill Corp. v. J. L. Hargrove Builders* (supra), [See Petitioners' Appendix A-14], 37 *Am. Jur 2d* (Fraud and Deceit) #353.[6]

Hargrove's claim that the evidence does not support the award of damages ignores the evidence received at the trial (and as outlined and set forth in Petitioners' Appendix as

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[6] There are only two (2) rules or formulas on the question of the proper measure of damages recoverable in an action for fraud and deceit. These rules are known as the "benefit-of-the-bargain" rule and the "out of pocket" rule. (or a combination thereof known as the "formula" rule). Assuming, *arguendo*, that Hargrove is correct in his argument (ie., that the benefit-of-the-bargain rule is not the proper measure of damages), then under the "out of pocket" rule (which Illinois does not follow), the Respondent would be entitle to recover his entire investment in the partnership, ie., $200,000.00 (which is more than the damages awarded in these proceedings).

Exhibit D [and in particular D-6]). In the petition herein, Hargrove argues that "Illinois Courts ... are supposed to require every plaintiff to show his damages with a 'fair degree of probability'." and cite the case of *Nisbet v. Yelnick*, 124 Ill. App. 3d 466, 474 N.E. 2d 781 (1984). *See* Petition, page 25. The *Nesbet* case involved an action for breach of warranty (ie., cracks in the foundation of a new home) and had nothing to do with an action in tort (for fraud). Even though the case is not on point, the *obiter dicta* in the case may be germane here:

> "Absolute certainty concerning the amount of damages is not required to justify recovery where existence of the damages is established. The evidence need only tend to show a basis for computation of damages with a fair degree of probability. * * *"

On the same page of their petition, Hargrove also cites the case of *Leon v. Thorlief Larsen and Sons, Inc.*, 133 Ill. App. 2d 911, 913, 272 N.E. 2d 799 (1977). This case involved a union bricklayer that sued his former employer for breach of contract of employment and held that a defendant's failure to explicitly deny allegations of damages in a complaint was not an admission thereof.

Alluding again to the opinion of Justice Clark (at page A-14 and 15 of petitioners' appendix) the correct and applicable proposition of law can be stated as follows:

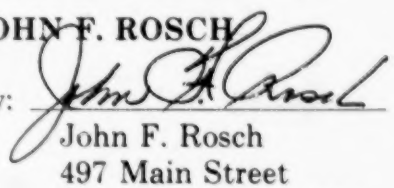
> "The proper measure of damages under the benefit-of-the bargain rule, then, and the formula that was used by the circuit court, was the difference between the joint venture's liabilities as misrepresented by Hargrove and what those liabilities actually were. How Rosch or the joint venture subsequently dealt with those liabilities was irrelevant to this determination. Our review of the record also convinces us that the results arrived at by the circuit court in applying the benefit-of-the-bargain rule were amply supported by the evidence.

CONCLUSION

For all of the foregoing reasons, this respondent urges this Court to dismiss Petitioner's Petition for want of jurisdiction or, alternatively, to deny the petition.

Respectfully submitted,

JOHN F. ROSCH

By: 

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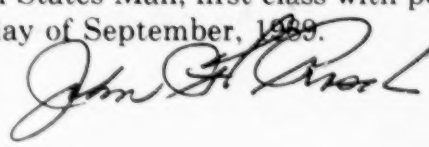
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari was duly served on Michael H. King, P.C. and Alexander R. Domanskis at 150 North Michigan Avenue, Suite 2500, Chicago, Illinois 60601 by United States Mail, first class with postage prepaid, on this 18 day of September, 1989.



APPENDIX

A1

STATE OF ILLINOIS

OFFICE OF THE
SAVINGS AND LOAN COMMISSIONER

SUPERVISORY

REPORT OF EXAMINATION

of

GLEN ELLYN SAVINGS AND LOAN ASSOCIATION
444 MAIN STREET
GLEN ELLYN, ILLINOIS 60137

THIS REPORT OF EXAMINATION IS STRICTLY CONFIDENTIAL

This report is for supervisory purposes only. A copy is furnished the directors and officers of the subject association for their confidential information. Under no circumstances shall the association's directors, officers or employees disclose or make public in any manner all or part of this report.

AS OF CLOSE OF BUSINESS

APRIL 23, 1983

This report contains 22 consecutively numbered pages.

June 9, 1983

FHLBB Docket No. 6110

Commissioner of Savings and Loan Associations, State of Illinois
Springfield, Illinois

and

Supervisory Agent, Federal Home Loan Bank Board
Chicago, Illinois

We have made a supervisory joint examination of GLEN ELLYN SAVINGS AND LOAN ASSOCIATION of Glen Ellyn, Illinois as of April 23, 1983 and submit herewith a report of our findings. Comments and conclusions are based on analyses of information obtained from the institution's records and from other authoritative sources.

/s/ DONALD J. KEANE
State Examiner

/s/ DONALD H. SORENSEN
Federal Home Loan Bank Board Examiner

REPORT INDEX

2. Interests of John F. Rosch

In addition to his duties as Managing Officer, Mr. Rosch is also active as an attorney doing business as the Law Office of John Franklin Rosch, Ltd. This firm occupies some space rent free in the association's office building as partial consideration for the preparation of tract searches and the issuance of title policies. From August 28, 1982, to April 1, 1983, Mr. Rosch stated that this firm received $26,573 in legal fees from the association. Michael Pietrzak, a multiple borrower of the association who Mr. Rosch states is an "independent contractor," is working on several items of litigation mentioned in Mr. Rosch's attorney letter.

Mr. Rosch previously disclosed to the directors and supervision that he is an attorney for Gerald A. Heinz, who is the association's largest multiple borrower. He has also disclosed that he has had various personal business transactions with Mr. Heinz that sometimes involved projects being financed by the association. Mr. Rosch has repeatedly stated that his relationship with Mr. Heinz has had no adverse effect on the association.

In the board of directors' December 10, 1982 response to supervision, Mr. Rosch "agreed to sever any and all relationships with Mr. Heinz so that the potential for a possible conflict of fiduciary duties cannot hereafter arise." The letter further states that "any subsequent dealings with Mr. Heinz will be done only by the board of directors with Mr. Rosch abstaining from any vote. In addition thereto, Mr. Rosch, in his capacity as a private attorney, has agreed not to have his office represent Mr. Heinz in future matters and has further agreed that upon the conclusion of presently pending matters, his office will not perform any legal services for Mr. Heinz that are related to any matters which might, directly or indirectly, involve the Savings and Loan."

a) **Old Business**

Mr. Rosch and Mr. Heinz continue to be listed together on signature cards for the following partnerships:

H-R-G Partnership
Deerpath Farm
535 Pennsylvania Partnership
Piers II Development Company
Oak Hill Developers
Glenco Development Company
R.H.H., Inc.

With the exception of H-R-G, Deerpath, and 535 Pennsylvania discussed later, Mr. Rosch has sold his interest to Mr. Heinz, but remains on the signature cards to control the repayment of association loans and other funds he is owed personally by Mr. Heinz.

1) **H-R-G (Woodridge)**

Mr. Rosch states that he is a partner in H-R-G to control Mr. Heinz's finances. The projects involve those he had purchased interests in from Jack Hargrove in 1980 and sold to Mr. Heinz in 1981.

He is also a creditor of H-R-G in the approximate amount of $400,000. As shown in the May 26, 1982 Examination Report under "Waterbury", sale proceeds of $500,000 were used to open jumbo savings accounts at the association in the name of John Rosch, trustee for H-R-G.

These accounts were later closed, but Mr. Rosch said that all but $100,000 went to pay various creditors of H-R-G or Mr. Heinz. Mr. Rosch said the $100,000 was used to pay his own income tax liability which arose from the previously mentioned sale to Mr. Heinz.

2) **Deerpath Farms (Batavia)**

Mr. Rosch said he has an interest in four of seven parcels in this project. The association has previously granted loans on the security of the other three parcels to Kenneth Heinz, son of Gerald Heinz. Mr. Rosch said that he will sell his interest to Kenneth Heinz when the property warrants development, quite probably this year.

3) **535 Pennsylvania Partnership**

Mr Rosch states that this partnership is his personal business because it has no connection with the association.

b) **New Business**

Mr. Rosch abstained from voting upon the November 1982 purchase of controls from Mr. Heinz, and although the minutes were not yet available, he stated he also abstained from voting on the May 1983 purchase of contracts from Mr. Heinz and will abstain from voting on the latest purchase from Messrs. Heinz and Breault.

b) **Oak Hills, Woodridge, Illinois**

The association granted a $150,000 loan secured by ten acres of unimproved land zoned for 18 four-unit condominium buildings and four six-unit buildings in 1977. In 1981, six lots were released when the association granted six $140,000 construction loans to build four unit buildings. The borrower was Beverly Bank Trust No. 8-7010. The beneficiary of the trust was Jack Hargrove Builders, Inc. and the loan was guaranteed by Jack Hargrove. In a prior examination report Mr. Rosch informed the examiners that he purchased an interest in this property which was subsequently sold to Gerald Heinz. Mr. Rosch said that Jack Hargrove is no longer involved in the project, and it is

being finished by Gerald Heinz, who is also making payments on the initial loans. Technically based on loan documents, Jack Hargrove remains the obligor since Gerald Heinz has not signed an assumption agreement with the association.

As of March 31, 1983, the loans have a net balance of $731,129. At this date, all of the loans are delinquent ranging between three and eleven months. In addition, there have been no condominium sales closed. Appraisals by Richard Brooker, C.A.S. indicate a value of $1,412,000 on a "retail" basis only therefore do not conform to Memorandum R 41a. Construction activity has increased during the Spring of 1983 and by May 1983, all of the units are nearing completion.

President Rosch said that 22 of the units have been sold but closing is a slow process because all of the sales are FHA or VA. He added that four additional four unit construction loans of $140,000 were granted during March 1983. The beneficiary of the trust holding title to these four properties was Gerald Heinz. He said based upon an oral agreement with Mr. Heinz, there will be no loan disbursements until the existing condominium units are sold and the loans repaid.

4. **Real Estate Owned Contracts**

Prior examination reports have detailed the association's purchases of contracts from various builders. Most of the contracts are converting into adjustable rate mortgages at maturity. As delinquencies arise, or the contract purchasers become unwilling or unable to continue payments, the association is "foreclosing" or at least perfecting title, and taking possession to many of these units. Perfecting title generally entails getting a quit claim deed or a mutual release form signed by the contract purchaser. If the units are abandoned, the association has to file a "declaration of forfeiture" and get a court order to clear title.

At March 31, 1983 "scheduled contracts" because of delinquencies are minimal, but the association has an inventory of 29 foreclosed units as follows:

Project	No.	Balance
Waterbury	19	$ 715,426
Willow Shores	4	164,298
Willow of Fox Valley	3	126,627
Piers II	1	55,114
Timber Ridge	1	52,015
Briar Hill	1	47,051
Total	29	$1,160,531

As readily seen, a significant concentration of these units is in one project, Waterbury. A total of 122 contracts were purchased in this complex in March 1982. The seller was Glenco Development Company, Ltd., owned by Gerald Heinz. Mr. Rosch has previously disclosed that he was once a part owner in this project. Private mortgage insurance covered 66 of the contracts. At our date, eight of the 19 "repossessed" units were rented and there were sale prospects for several of the remaining units. The association is offering a "rental with option to buy" alternative in addition to outright sales of the units.

Private mortgage insurance claims are placed in a reserve account which is used to pay taxes and assessments until sale, at which time the claim is netted against the book balance for profit determinations. At March 31, 1983, the reserve account totaled $112,358 for 13 units and there were additional claims pending of approximately $90,000 for nine additional units. With four exceptions, these claims all relate to Waterbury units. Based upon master appraisals in the project and appraisals supporting new loans being granted, there are no indicated losses at this time.

Mr. Rosch stated that management was aware that there would be some problem borrowers in the Waterbury project, but stated that the private mortgage insurance and large amount of discount income easily justified the association's involvement. He believes the worst is certainly over and expects the remaining contract purchasers to live up to their obligations.

Board of Directors
Glen Ellyn Savings and Loan
Association
444 Main Street
Glen Ellyn, Illinois 60137

Gentlemen:

Transmitted herewith is a copy of the report of examination of the association as of the close of business, April 22, 1983, made by examiners representing the Commissioner of Savings and Loan Associations and the Federal Home Loan Bank Board.

The examiners' report results from their analysis of the association's activity since the preceding examination. Due to the scope limitation this examination should not be considered an audit.

The examiner's report may include matters not specifically referred to hereafter in this letter. In my judgement these matters are either not serious enough to request corrective action at this time, or, the corrective action taken or assured by management is satisfactory. They do, however, deserve your careful consideration.

A review of the examination report indicates that your careful attention should be directed to the following matters:

ITEM I-C - SCHEDULED ITEMS

Scheduled items increased over 30% during the review period and totaled $9,444,984 or 11.3% of assets at the date of the examination. A majority of the scheduled items from the previous report of examination are repeated and many of the new scheduled items consist of forfeited real estate contracts. These real estate contracts were a subject of comment in the prior report.

Over 70% of the scheduled items are concentrated with a relatively few borrowers and consist of land development projects as shown at page 6 of the report of examination. Also, you should advise us of your plans for the acreage in Fox River Grove.

The minutes of your next regular meeting should record your consideration of the entire report and the corrective action taken to matters set forth above. Immediately thereafter, your detailed reply stating the corrective action taken, should be forwarded to this office in quadruplicate. The reply *should be signed by each director* and forwarded *within thirty-five days.*

Pursuant to Section 7-2 (c) of the Illinois Savings and Loan Act, each director should execute a signed affidavit acknowledging that he has read the report of examination. This affidavit should be filed and preserved by the association.

Should the Federal Home Loan Bank Board have any comments relative to this examination, they will be forwarded to you by this office at a later date.

Very truly yours,

/s/ J.R. CROWN

J.R. CROWN
Chief Examiner

JRC/JLT/lvn

cc: Supervisory Agent
OES, FHLBB